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No. 85-93

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION OF THE UNITED STATES

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QUESTION PRESENTED

1. Should this Court grant *certiorari* to review the fourth circuit's decision that there was no pattern or practice of intentional discrimination in the salary claims of Petitioners when the salary claims were correctly decided and no pattern or practice of intentional discrimination was found by the district court?

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STATEMENT OF THE CASE

This action was instituted in the U.S. District Court for the Eastern District of North Carolina on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (NCAES) alleging racial discrimination in employment and the provision of services by NCAES on behalf of 5 purported classes of blacks and indians. The United States intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1.

The United States was permitted to amend its complaint in intervention by Order of the Court on October 9, 1979, to include allegations of a pattern and practice of racial discrimination in alleged violation of Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Class action certification was denied by the Court on October 9, 1979, after discovery closed.

On November 23, 1981, plaintiffs, amended their complaint to allege violations of Title VII. The defendants denied all allegations of discrimination. The nonbifurcated trial of this action began on December 7, 1981, and ended on February 12, 1982. Counsel for the United States and plaintiffs, acknowledged this was a disparate treatment case and that they had the burden of proving a policy, pattern and practice of intentional discrimination. (Tr. 10, 13, 16). The plaintiffs and the United States called over 46 witnesses to testify and introduced a multitude of exhibits in support of their pattern and practice and individual claims.

The defendants' case began on December 31, 1981 and the defendants called over 15 witnesses and introduced over 250 exhibits in support of their contention that no pattern or practice of discrimination existed and that the individual plaintiffs were not entitled to relief.

Both the United States and the private plaintiffs called rebuttal witnesses. (Tr. 6411-6616). The transcript consisted of 32 volumes and 6818 pages. Although there was some overlap of exhibits, the defendants introduced 274 exhibits, the plaintiffs 262 and the United States 274.

On August 20, 1982 and September 17, 1982, the Court entered Judgments and Orders dismissing all claims of both the United States and the individual plaintiffs.

In its decision of August 20, 1982, with respect to the pattern and practice claims, the Court found as follows:

(a) That this was not a proper action to be certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. (49a) This Finding was appealed.

(b) That blacks are not discriminated against in geographical employment assignments in NCAES. (53a) This Finding was not appealed.

(c) That NCAES does not discriminate in recruitment of black professional employees (55a) This Finding was not appealed.

(d) That NCAES does not discriminate in hiring black professionals at the county and state levels and NCAES's selection procedures are non-discriminatory. (62a) This Findings was not appealed.

(e) That NCAES does not discriminate in assignments of professional personnel to areas of responsibility (i.e. crops, livestock). (64a). This Finding was not appealed.

(f) That NCAES does not discriminate in title promotions of county level professional employees (from assistant to associate to full agent) and the performance evaluation system used in connection with promotions of county level professionals was valid, and non-discriminatory. (74a) This Finding was not appealed.

(g) That NCAES does not discriminate in the selection of county extension chairmen. (101a) This Finding was appealed.

(h) That NCAES does not discriminate in the selection of state level positions such as director, program leaders, specialists, and district chairmen. (106a) This Finding was not appealed.

(i) That NCAES does not discriminate with respect to terms, conditions and privileges of employment. (72a) This Finding was not appealed.

(j) That NCAES does not discriminate in connection with salaries. (150a) This Finding was appealed.

(k) That NCAES does not discriminate in work assignments. (152a). This Finding was not appealed.

(l) That NCAES has established valid, nondiscriminatory qualifications, tests, selection standards and procedures in hiring and promotion. (158a) This Finding was not appealed.

(m) That NCAES has taken appropriate action to correct the present effects of past racially discriminatory policies and practices. (163a). This Finding was not appealed.

(n) That NCAES provides equal services to minorities (164a). This Finding was not appealed.

(o) That NCAES' services to farmers and other persons are provided on non-racially segregated basis. (164a). This Finding was not appealed.

(p) That NCAES is not in violation of Title VI in the delivery of services to 4-H and Extension Homemaker Clubs. (185a). This Finding was appealed by Petitioners but not by the United States.

(q) That the case was a disparate treatment case, and NCAES did not engage in a pattern or practice of racial discrimination. (205a)

In its decision of September 17, 1982, the Court analyzed the individual claims of 42 plaintiffs and determined that none were entitled to relief.

The United States and private plaintiffs appealed to the fourth circuit. The United States appealed from only *3* of the 16 adverse rulings on their claims of alleged pattern or practice of discrimination. The private plaintiffs appealed from only *4* of the foregoing adverse rulings.

Decision was rendered by the court of appeals on December 10, 1984, affirming the district court's two judgments in all respects. Judge Phillips dissented on three claims, to wit: the 4-H Club claims; class action and sal-

aries. He affirmed in all other respects. Petitions for Rehearing and rehearing *en banc* were denied by an evenly divided court on April 15, 1985.

On July 15, 1985, the private plaintiffs petitioned this Court for Writ of Certiorari to review the denial of the salary, county extension chairmen, 4H and Home Economics Clubs, and class action claims. NCAES filed a Brief in Opposition to private plaintiffs' petition, which Brief is referred to in respect to NCAES' position and grounds for opposition of all issues for which review is sought by private plaintiffs.

The United States obtained permission to extend its time in which to file a petition and response to private plaintiffs' petition until September 16, 1985. On September 16, 1985, the United States filed a Petition for Writ of Certiorari and Response to private plaintiffs' petition.

The United States sought review of only one issue related to the salary claims and responded to the other questions raised by private plaintiffs by stating it did not believe the remaining questions merit review by this Court. The one issue which the United States argues that this Court should review has been conceded by the United States to be a "rather narrow one." NCAES opposes the Petition for Writ of Certiorari filed by the United States.

SUMMARY OF ARGUMENT

The court of appeals correctly decided the salary claims in this disparate treatment case. The district court properly analyzed the salary claims by the allocation of proof set for pattern or practice and individual claims of racial discrimination through disparate treatment, which claims require proof of intentional discrimination, be they Title VII or 42 U.S.C. § 1981. The district court and court of appeals correctly followed *McDonnell-Doug-*

las v. Green, 411 U.S. 792 (1973); *Teamsters v. United States*, 431 U.S. 234 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *United Airlines v. Evans*, 431 U.S. 533 (1977) in requiring petitioners to prove their assertions of intentional discrimination. In each instance, petitioners failed to do so. The existence of intentional discrimination is for the trial court to decide. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's two decisions clearly show this was carefully decided on the facts and the facts showed no discriminatory intent.

The petitioner United States has elected to attempt to obtain review of an issue which it concedes is a rather narrow one and of diminishing importance. That issue is also one which the petitioners have created based upon an incorrect view of the facts and the decisions of the district court and the court of appeals. Petitioners claim that the decision permits the continued existence of discriminatory pre-1965 wage scales to justify post Act payment of lower salaries to blacks than similar situated white NCAES employees. This is incorrect and disregards the facts in this case.

Petitioners seek review by avoiding the facts and utilizing misdirected and specious assertions. Knowledge of the particular facts surrounding NCAES, its special requirements for hiring, staffing and the real non-discriminatory factors which clearly affect salary differences between all agents regardless of race is essential. NCAES employees, black or white, are not similarly situated.

Extension service employees in each of the 100 counties of North Carolina have factors affecting salary that are different from county to county and have nothing to do with race. Petitioners come here asserting the same old arguments which have failed them in the past. There are no "wage scales" involved and petitioners failed to

prove intentional discrimination in both pattern or practice and individual salary claims.

NCAES employees are professionals with college degrees required. Each of 100 counties has needs for different training and educational skills for NCAES agents and each county contributes different percentages of each agent's salary and percentages vary annually. NCAES pays the remaining percentage of an agent's salary. Salaries are not now, nor have they ever been, the same except for the minimum starting salary. From initial employment on, salaries of agents vary from county to county depending on performance, percentage of state versus county contribution and many other factors, none of which are racial.

The United States and private petitioners tried this case without regard to the facts surrounding the NCAES and are here trying once again to catch the Court's eye with an issue bearing no factual relationship to the NCAES salary and operational structure. This case is a disparate treatment case and petitioners failed to prove intentional discrimination.

At trial, petitioners submitted inaccurate comparisons and statistics which failed to utilize the proper factors affecting all agents' salaries. NCAES refuted and rebutted such evidence and showed it to be inaccurate and lacking in probative weight, which is permissible under standards set by this Court in *Dothard v. Rawlinson*, 433 U.S. 331 (1977) and *Teamsters, supra*. The district court and court of appeals properly rejected such evidence and improper statistics. Petitioners have nothing new or important to bring before this Court in connection with the salary claims or any other self-styled issue.

NCAES met the claims of petitioners and the United States head on in the trial of this case, responded to each claim, and showed an organization free from racial discrimination. Certiorari should be denied.

ARGUMENT

THE SALARY CLAIMS WERE CORRECTLY DECIDED AND CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THEM.

The Intentionally Discriminatory "wage scale" argument is specious

Petitioners argue that the decision holds that Title VII permits an employer to continue to pay similarly situated blacks less than similarly situated whites pursuant to intentionally discriminatory "wage scales" established prior to 1965 and that alleged resulting disparities constitute continuing violations of Title VII in conflict with other decisions of the fourth circuit. The opinion does not hold that at all and there is no evidence that NCAES ever established "intentionally discriminatory wage scales" prior to 1965 or at any other time. NCAES agents, whether black or white are not similarly situated.

Petitioners have made blatant assertions as to what the district court and fourth circuit held without providing the Court with the facts surrounding NCAES, its organization, structure, salary process and promotion practices. Knowledge of the NCAES, its organization, structure and salary process is essential to an analysis here. The district court's opinion is respectfully referred to for a detailed summary of NCAES, its function, salary process, programs, and employment processes. (6a-207a)

It is essential to understand from the outset that NCAES is not a factory assembly line endeavor, nor a corporation whose work force engages in similar tasks in similar work environments at plants and offices located within each of North Carolina's 100 Counties. Petitioners refer to the NCAES salary process as "wage scales" as if this case were a plant setting. Such is not the case.

The district court and the panel majority recognized that no "wage scale" situation exists and no meaningful

conclusions as to salaries can be drawn by petitioners comparing agents' salaries by title, race and tenure across county lines. Both courts correctly understood that such a comparison led to no valid conclusions at all under the facts of this case. North Carolina is divided geographically into 100 counties. Each county is a separate governmental agency with its own elected Board of Commissioners. NCAES and each county enter into a "Memorandum of Understanding" which is a separate written agreement and which, *inter alia*, governs the hiring of NCAES professional employees within the county and the amount of financial support that particular county will contribute towards the NCAES professional employees' salaries on a percentage basis. NCAES county level professional employees, i.e., agents, receive two checks each month. One is from the NCAES, funded by state and federal funds, and the other from the County. NCAES agents cannot be hired to fill a county agent position without County approval. The salary claims of petitioners focus on county level employees of NCAES. (20a-24a).

The specific needs of each of North Carolina's 100 counties determine the educational background and skills needed in the agents it employs. The minimum educational requirement is a bachelor's degree and skills within subject matter areas such as are needed by a particular county's extension program, to wit: Agriculture, 4-H, Home Economics or CRD. For instance, if a particular county has a large dairy farm population, its agricultural program needs would require an agent with a dairy or animal husbandry educational background or training skills. Thus each county has special needs. (58a-60a)

Why is this so? The answer is simple. North Carolina counties vary greatly in population, rural/urban population, size, racial makeup, topography, agrarian needs and resources. The climate and adaptability of the land

for crops, trees, poultry and livestock vary tremendously between counties located within the coastal plain, piedmont and mountain regions of the State. Black agents prior to the 1965 merger only functioned in 51 out of 100 counties and there are counties which have never had black extension agents due to the fact that few blacks reside there and blacks did not apply for extension positions there. (28a-29a, 48a, 192a-193a) No discrimination was found in NCAES assignment, recruitment or promotion of black NCAES employees.

Thus, the qualifications (educational background and skills) of the individual agents required to serve the needs of each county must differ and are in fact different as the record here reveals. (58a-59a) It is undisputed in this case that because of the wide variance among North Carolina's counties, the requirements for extension staff vary greatly from county to county and the needs of a particular county dictate the areas of subject matter responsibility, i.e., livestock, soybeans, etc., extension agents must possess within the particular county. Once an agent is hired to fill a county level professional position, he or she cannot be required to move or transfer by NCAES from one county to the other nor fill a position opening for which that agent is not qualified by education, training or interest to fill. (59a-61a) Each position carries its own special needs depending on the needs of the particular county. Where special qualifications are required to fill particular jobs, comparisons to groups who do not possess such special qualifications are of little probative value. *Hazelwood School District v. United States*, *supra*, 307-308. Just as the varying needs of each county governs its NCAES professional staff, the variance between each 100 counties in size, population, agriculture and wealth, governs each county's particular ability to financially support its Extension program within the county, including contributions to county agents' salaries. This has always been the case.

Because of this fact, some counties have an ability to pay more of an agent's salary than other out of their own funds and to pay their agents higher salaries. The remainder of each agent's salary comes from state and federal funds. The federal government allocates a sum of money to NCAES each fiscal year. Federal funds are combined with funds from the North Carolina general Assembly for NCAES to support salaries for county extension employees. The NCAES in consultation with the Board of County Commissioners determines what the state share of the agent's salary will be from the federal and state funds and what the county will pay that agent as its contribution. (20a) The percentage of salary paid by the county and NCAES varies greatly from county to county. These percentages change each year depending on the county's individual ability to pay and interest in the NCAES program within the county. In 1981 the percentage of salaries of local extension staffs that were paid by county funds ranged from a high of 57% in Forsyth County to a low of 18% in Camden County. (110a-113a).

Each county's extension staff is not staffed at the level of others. Each county staff is headed by the County Extension Chairman ("CEC") who is the highest paid NCAES county staff member in the county. The salary received by CEC's varied greatly between counties depending on the county's support. (DX 67-1-67-100) The minimum county staff is 2 and several counties have staffs exceeding ten agents in number. The agent determines whether or not to apply for each vacancy and applicants who do not have the skills and educational background required for the county vacancy are not considered. The district court found that the recruitment and hiring practices of the NCAES were valid and non-discriminatory. (58a-62a)

NCAES sets a minimum salary level for all new employees at the Assistant Agent Level with a bachelor's

degree and no prior experience. A salary differential is offered to those holding master's degrees. On occasions, due to "market demand" an agent has been employed above the entry level in order to obtain the skills in short supply. There have also been times when prior and relevant experiences justified a salary above minimum entry level. (109a) Since 1965, NCAES has set the minimum starting salary for all new county agents uniformly. (383a)

After initial employment, the agent or a County Chairman's salary may be affected at any given time by a great number of factors such as tenure, additional degress, subject matter area of specialty, area of responsibility, job performance and promotion from assistant agent to associate agent to full agent, ability of county to pay, state and county across the board raises, state and county merit increases, market competition for holders of certain educational degrees, and competition between counties for a certain agent's skills. (109a-116a, 133a-136a, 383a-385a) Contrary to petitioner's assertions, these variable factors are real, not imaginary and are supported by the record. (362a)

The position of County Extension Chairman was established in 1962 prior to the enactment of Title VI. (82a-83a) The County Extension Chairman is the top administrative position in each county. (74a, 82a) Petitioners tried to lump CEC salaries in their statistical salary comparisons of other agent's salaries. (136a-138a)

The panel majority noted the difference of the County Extension Chairman in salary and stated:

> "The district court correctly declined to compare or include the salaries of County Chairmen with those of agents. There is about a $4,000.00 average salary difference between chairmen and agent to begin with. The chairman is the head of the county based employees of the Extension Service. He is not

> routinely promoted from agent; the method of his selection is entirely different, and counting the salaries of the County Chairman together with those of the agents for purposes of analysis could only distort the result. (382a-383a)

The salary paid the chairman sets the *maximum extension salary* pay of any agent for that county. (DX 67-1-67-100, A. 632-633, 2210) Regardless of the starting salary, level, skill, performance or tenure, an agent's maximum will be *capped* by the salary paid to the chairman. There was one exception found in 1981, in Alamance County, where the salary of Ozetta Guye, a black HEA, exceeded that of the Chairman. (DX 67-86) As between County chairmen the salary ranges have always varied thereby directly impacting on the maximum amount of the agents' salaries within the counties. This accounts for differences among county agents' salaries and has nothing to do with race. Petitioners attempt to direct attention from this. The reason why can be plainly seen from the following facts.

In 1971, chairmen's salaries ranged from lows of $11,601 (Dare) and $11,621 (Avery) to highs of $16,588 (Wake) and $16,646 (Rockingham). In 1976 the range was from low of $16,028 (Dare) to high of $23,931 (Wayne). In 1981, CEC salaries ranged from lows of $20,000 (Stokes, Clay) to highs of $34,577 (Sampson) and $34,588 (Lenoir). (DX-196) As no one under the chairman receives a higher salary on the county level, this is proof positive that salaries vary from county to county because of this factor.

App. Exhibit A is a copy of DX-196. This Exhibit shows the percentages of county contribution to the NCAES program for all 100 counties in 1971/72 together with the salaries of all 100 CEC's for the years 1971, 1976 and 1981. This clearly shows the variances in salaries between counties. As the CEC's salary is the cap, the variances of salaries between agents from one

county to the next vary as well. It further proves there are no uniform wage scales and NCAES agents are not similarly situated.

The salary process is non-discriminatory

The salary process of NCAES conducted annually involves pay raises of only three kinds. The panel majority grasped this fact and stated:

> "At the outset of this part of the discussion, certain matters admitted or found by the district court and not appealed are important to remember. There is no discrimination in hiring. There has been no discrimination in promotion from assistant to associate to full agent. Pay raises of three kinds from whatever source, percentage raises, across the board raises, and merit raises. There is no discrimination in across the board and percentage raises. Everyone gets them . . . ." (Id. p. 25, 26) The merit salary process was determined to be nondiscriminatory. (383a)

Another factor which explains differences in salaries is that the percentage of total salary paid by each county varies from county to county. Percentages ranged from 18% to 57% in 1981. This factor alone causes differences from entry level on with respect to across the board and percentage raises, from state/federal and county funds, regardless of source and from year to year. Race has nothing to do with percentage contributions. (383a)

For example. Two agents both started at $15,000.00 entry level in 1981, and both agents were employed as agricultural agents with agronomy backgrounds. Each was employed to fill a vacancy in a different county. In 1982, the State of North Carolina provided a 5% cost of living increase. The effect would be as follows:

1. Agent A was employed by a county paying 30% of his salary. Thus Agent A's salary was 70% state/federal funds and thus 70% was subject to the 5% cost of living

increase. Agent A would receive 5% of 10,500 (70% of 15,000) as an across the board raise. Thus if A received no other raise, A's raise would be $525.00 (5% of 10,500).

2. Agent B was employed by a county paying 57% of his salary. Thus Agent B's salary was 43% state/federal funds and thus 43% was subject to the 5% cost of living increase. Agent B would receive 5% of $6,450 (43% of 15,000) as an across the board raise. Thus if B received no other raise, B's raise would be $322.50 (5% of 6,456), a difference in across the board raise in annual salary for 1982. No other raises considered, A would receive in excess of over $200.00 per year simply as a result of the county percentage factor.

The record shows that every year some counties grant across the board increases in salary and some do not. NCAES does not utilize the funds allocated by the state/federal increases and take state salary money from those counties who support the program to fund county portions of raises in those counties who do not support the program with across the board raises. This factor causes a variance each year. (110a-111a, 135a, 383a) All one has to do is apply a county percentage across the board raise to A and B of different percentages and the margin in salary could be reduced or widened considerably. Such a factor is not created by imagination or ingenuity of counsel.

Tenure, educational level (i.e., masters or doctorate), size of program and area of skill are factors in an agent's salary, including having a skill which is particularly needed. (109a) Also inflation is a factor which cannot be overlooked in salary analysis. The cost of entrance level hiring has gone up and salaries have to be adjusted upward to keep abreast of starting salaries for assistant, associate and full agent, none of which have anything to do with race and are uniformly set. (115a)

These factors are real and non-discriminatory and are applied annually. The United States acknowledges that they are reasonable factors for consideration in salary analysis. (Pet. p. 20)

The merit salary process involves the one area of NCAES pay increase (excluding county merit) which is not across the Board. A discussion of the merit process is contained in the district court's opinion. (113a-116a). This process was found to be non-discriminatory and based upon a valid performance evaluation system. (154a-158a)

The Decision is not in conflict with other Courts of Appeals

Disregarding the foregoing facts about NCAES, its salary structure and process, Petitioners assert this decision with respect to salary is in conflict with other Courts of Appeals to the effect that Pre-Act, intentional discrimination cannot be used to justify Post-Act payment of lower salaries to blacks than to similarly situated white employees. This argument is specious on the facts of this case.

It is readily apparent that NCAES employees, both black and white are not similarly situated because of the varying real and differing factors affecting each one's salary and job requirements. The fact that CEC salaries in the 100 counties varied by as much as $4,900.00 in 1971 and by as much as $14,000.00 in 1981 clearly shows that NCAES employees, white and black have never been similarly situated and that no wage scales existed. This case is not in conflict with decisions of other Courts of Appeals cited by the United States.

Petitioners argue that this case should be reviewed and remanded in the face of the facts on this record which clearly refute their specious wage scale assertions so the "presently unclear" effects of the so-called "discriminatory wage scales" can be determined. This limp

assertion is diluted by the United States admission that it recognizes its own issue to be a "narrow one" and that what it asserts as a "lingering effect" of the pre-1965 NCAES system is buried in a complex matrix of post-Act salary decisions such that the so-called discriminatory effect is presently "unclear."

What Petitioners avoid is the fact that this is a disparate treatment case and that they failed to prove intentional discrimination at trial. The requirement of intentional discrimination as part of the United States' burden of proof is acknowledged by it in its petition. (Pet. p. 18) Petitioner also acknowledges that the plaintiff had to establish not only a disparity in average wages but also NCAES intent to discriminate in connection with salaries. (Pet. p. 18) This critical element it failed to prove at trial.

The district court determined the case to be one of disparate treatment under *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) requiring proof of intentional discrimination in Title VII claims of disparate treatment. In a disparate treatment case proof of discriminatory motive is critical. *Teamsters v. United States, supra*, 335.

The allocation and burden of proof in a Title VII disparate treatment pattern or practice case is governed by *Teamsters, supra.* It is important to note the district court's discussion of the pattern or practice claim:

> "A careful weighing and assessing of the plaintiffs' statistical and non-statistical evidence led the court to conclude that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practices, and the analysis proceeded on this assumption. While not conceding that plaintiffs had made a prima facie case, the defendant Extension Service assumed the burden of articulating plausible reasons for its actions, and its evidence, which the court found convincing, has been set forth herein. When the plaintiffs failed to produce evidence to establish that defendant's reasons

> were pretextual plaintiff's case failed. *EEOC v. Korn Industries, Inc.*, 682 F.2d 256, 262 (4th Cir. 1981). (190a-191a)

It is clear Title VII disparate treatment and 42 U.S.C. 1981 claims both require proof of intentional discrimination. *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982). The district court found there was no intentional discrimination and that the reasons offered by NCAES were valid and plausible and not rebutted. (104a) The existence of intentional discrimination is for the trial court to decide. *Pullman v. Swint, supra.* The district court made no finding that NCAES established or maintained intentionally discriminatory wage scales.

Title VII became applicable to public employers in 1972. *Hazelwood School District v. United States, supra,* decided after *United Airlines v. Evans,* clearly held that a public employer (NCAES) who from that date forward (March, 1972) made all its employment decisions in a wholly non-discriminatory way did not violated Title VII even if it had maintained an all-white work force by purposefully excluding Negroes. Petitioners' argument is fraught with misleading statements. Assertions that the majority opinion holds that "North Carolina is free to pay blacks hired prior to 1965 less than whites for the rest of their lives" and to pay blacks based on "racially motivated pay schedules established in the past" are evidence of such distortions. The district court stated:

> "The court has been impressed by the absence in this case of so many of the usual badges of discrimination. For instance there was no evidence—that there is any difference in the entry level salaries of blacks and whites." (199a-200a)

Petitioners also ignore the fact that the district court carefully viewed the individual plaintiff's salary evidence and stated: —

> "The Court has therefore carefully reviewed plaintiffs' evidence showing individual salary comparisons and as a result has concluded that while that smile on its face and evidence unquestionably establishes salary disparities, when viewed in light of defendants' explanatory evidence it fails to prove discrimination." (122a-123a)

The district court was properly applying the *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) standards of proof when the district court analyzed individual plaintiffs' salary and promotion claims and considered them in determining the pattern or practice case. *Hazelwood* marked the point in time in which analysis of employment decisions by a public employer for purposes of violations of Title VII would start. An analysis by both the district court and the panel majority, as set forth in their opinions, clearly showed NCAE's employment decisions, including administration of salary, to be made in a wholly non-discriminatory way. The lack of proof of intentional wage discrimination coupled with the non-discriminatory salary process supports the decision that NCAES did not violate and was not violating Title VII in 1972 or to the present. Couple this with the findings, not appealed, that there was no discrimination in hiring, promotion, assignments, education opportunities, training or services and it is clear that the plaintiffs' distortion of the facts to attempt to lead the Court to believe that the NCAES salary process involved standardized "wage scales" at any time is specious. *Hazelwood* and *Evans* were properly followed here.

It is patently clear that petitioners' assertions are without merit and that the district court and court of appeals correctly decided the case on the evidence. No review is mandated here.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted, this 17th day of October, 1985.

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